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Supreme Court of the United States

October Term, 1974
No. 74-1563

THE CITY OF EASTLAKE, *et al.*,
Petitioners,

vs.

FOREST CITY ENTERPRISES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

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INDEX

OPINIONS BELOW 1

JURISDICTION 2

QUESTIONS PRESENTED FOR REVIEW 2

CONSTITUTIONAL AND CITY CHARTER PROVISIONS INVOLVED 3

STATEMENT OF THE CASE 4

A. Factual Background 4

B. Proceedings Below 5

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT 7

1. The State Court relied upon and wrongly interpreted decisions of this Court in finding that the automatic referendum voting procedure provided for by the Eastlake Charter, in respect to land use changes, is violative of the due process clause of the Federal Constitution 7

2. The Decision of the State Court is in conflict with the principles of this Court decided in *James v. Valtierra*, 402 U.S. 137 (1971) 8

3. Referendum is a fundamental part of the local legislative process and, being founded on neutral principles, should be exempt from Federal Constitutional restraint 9

CONCLUSION 11

APPENDICES:

A. Opinion of the Supreme Court of Ohio, Judgment Entry of the Supreme Court of Ohio, Orders of the Supreme Court of Ohio denying rehearing 13

B. Opinions of the Court of Appeals for Lake County, as to the appeal, and as to the cross appeal 39
C. Opinion of the Common Pleas Court of Lake County 45
D. Charter of the City of Eastlake 48
ARTICLE I—Preamble 48
ARTICLE I—Section 2. Powers 48
ARTICLE III—Initiative, Referendum and Recall—Section 1. Initiative, Referendum 49
ARTICLE V—The Council—Section 1. Powers, Number and Terms 49
ARTICLE VIII—City Planning Commission—Section 3. Mandatory Referral 50

CITATIONS

Cases

Donnelly v. Fairview, 13 Ohio St. 2d 1 (1968) 8
Eubank v. City of Richmond, 226 U.S. 137 (1912) 7
Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 10
Hilltop Realty v. South Euclid, 110 Ohio App. 535 (1960) 8
Hunter v. Erickson, 393 U.S. 385 (1969) 6
James v. Valtierra, 402 U.S. 137 (1971) 8, 9, 10
Ranjel v. Lansing, 417 F.2d 321, 324, cert. den. 397 U.S. 980 (1969) 10
Southern Alameda Spanish Speaking Organization v. City of Union City, Cal., 424 F.2d 291 (1970) 10
Spaulding v. Blair (4th Cir. 1968), 403 F.2d 862 7
State ex rel. Bramblette v. Yordy, 24 Ohio St. 2d 147 (1970) 9

Thomas Cassack Co. v. Chicago, 242 U.S. 526 (1917) 7
Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) 10
Washington, ex rel. Seattle Trust Co. v. Roberge, 278 U.S. 116 (1928) 7

Constitutional and City Charter Provisions

Charter of the City of Eastlake, Article VIII—Section 3 ..... 3, 5
Constitution of the State of Ohio, Article II, Section 1(f) 8
Constitution of the United States, Fourteenth Amendment, Section 1 ..... 2, 3, 6

Statutes

Ohio Revised Code, 133.16 5
Ohio Revised Code, 139.02 5
Ohio Revised Code, 1515.04 5
Ohio Revised Code, 5705.191 5
28 U.S.C. Section 1257 (3) 2

Supreme Court of the United States

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THE CITY OF EASTLAKE, *et al.*,
Petitioners,

vs.

FOREST CITY ENTERPRISES, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
To the Supreme Court of Ohio

Petitioners, The City of Eastlake, Ohio, and The City Planning Commission of The City of Eastlake, respectfully pray that their Petition for a Writ of Certiorari be granted to review the final judgment and opinion of the Supreme Court of the State of Ohio, entered in this case on March 19, 1975, upon which petitioners' petition for rehearing was denied on April 17, 1975.

OPINIONS BELOW

The judgment and opinion of the Supreme Court of Ohio, reported at 41 Ohio St. 2d 187, 324 N.E.2d 740, appears in Appendix A to this Petition, p. 13. The Eleventh District Court of Appeals of Lake County Opinion, which is not reported, appears in Appendix B hereto at p. 39. The Lake County Court of Common Pleas Opinion, also not reported, appears in Appendix C, p. 45.

JURISDICTION

The judgment of the Supreme Court of Ohio was entered on March 19, 1975. A timely filed petition for rehearing was denied on April 17, 1975, and this Petition for Certiorari was filed within ninety days.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

1. Whether an automatic voting procedure, whereby the electorate of a community, by neutral referendum vote, exercise a power of veto over legislative acts of its representatives in rezoning of land, is violative of the due process clause of the United States Constitution.

2. Whether the automatic and mandatory referendum voting procedure provided for by the Eastlake City Charter, under the Home Rule Provisions of the Ohio Constitution, requiring that any ordinance changing land use must first be approved by the voters in a city-wide election at a general or special election prior to becoming finally effective, is violative of the due process clause of the Fourteenth Amendment to the United States Constitution as decided by the Supreme Court of Ohio.

3. Whether the mandatory referendum procedure provided for by the Eastlake City Charter, for democratic decision making by the electorate as a whole in respect to changing land use, constitutes unlawful delegation of legislative power to the people in violation of the due process clause of the United States Constitution.

CONSTITUTIONAL AND CITY CHARTER PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment:

"§1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Charter of the City of Eastlake:

Article VIII—Section 3 of the Charter of the City of Eastlake provides in pertinent part, "That any change to the existing land uses * * * cannot be approved unless and until it shall have been submitted to the Planning Commission, for approval or disapproval. That in the event the City council should approve any of the preceding changes, or enactments, whether or approved or disapproved by the Planning Commission it shall not be approved or passed by the declaration of an emergency, and it shall not be effective, but it shall be mandatory that the same be approved by a 55% favorable vote of all votes cast of the qualified electors of the City of Eastlake at the next regular municipal election, if one shall occur not less than sixty (60) or more than one hundred and twenty (120) days after its passage, otherwise at a special election falling on the generally established day of the primary election. Said issue

shall be submitted to the electors of the City only after approval of a change of an existing land use by the Council for an applicant, and * * *".[1]

STATEMENT OF THE CASE

A. Factual Background

The facts are not in dispute. Respondent, Forest City Enterprises, Inc., an Ohio Corporation, owner of an eight (8) acre parcel of property in Eastlake, Ohio, on May 18, 1971, applied to the Eastlake Planning Commission for rezoning of its property from industrial to high rise apartment use classification.

Thereafter, the application of respondent was processed and approved by the City Planning Commission and on December 28, 1971, the Council of the City of Eastlake enacted Ordinance No. 1971-168, which provided for the requested change in zoning classification for the property in question.

In the meantime, an Amendment to the Eastlake City Charter had been placed on the ballot by initiative petition and was adopted at the general election on November 2, 1971. The Charter Amendment in question provided that no ordinance providing for change in land use in the City of Eastlake would become finally effective unless and until

1. For full text of pertinent Eastlake Charter provisions, see Appendix D, p. 48.

approved by a 55% majority vote of the voters in a city-wide referendum election.[2]

In May, 1972, an election was held and the Ordinance providing for the rezoning of respondent's property failed to obtain the requisite 55% affirmative majority of the votes cast.

B. Proceedings Below

Respondent filed for declaratory judgment and injunctive relief in the Court of Common Pleas of Lake County, Ohio, claiming the mandatory referendum voting procedure required by Article VIII, Section 3 of the Charter of the City of Eastlake, in respect to land change use, was unconstitutional as it denied respondent due process of law under the Ohio and United States Contitutions, and was violative of the referendum provisions of the Ohio Constitution.

The case was submitted to the trial court upon the complaint and answer, with certain stipulations of counsel as to the applicability of certain ordinances of the City of Eastlake and provisions of the Eastlake Charter. No evidence was introduced by either side.

The decision of the Court of Common Pleas, which found the mandatory referendum voting provisions of the Eastlake Charter in respect to land use change not to be

2. The Supreme Court of Ohio made no finding that the 55% majority vote requirement would stand as an impediment to the Constitutional validity of the Eastlake Charter referendum procedure as similar restrictive election requirements can be found in the Ohio statutes, e.g., R. C. 139.02 (for issuance of federal aid bonds); R. C. 133.16 (for issuance of bonds for reconstruction of bridges); R. C. 1515.04 (creation of soil and water conservation district); and R. C. 5705.191 (approval of excess tax levy).

in violation of respondent's constitutional rights, was later sustained by the Eleventh Appellate District Court of Appeals of Lake County, Ohio, in which the respondent raised the same Constitutional issues by assignment of error.

Thereafter, the respondent perfected appeal to the Supreme Court of the State of Ohio, and the Court in its Decision of reversal, found the mandatory referendum voting procedure of the Eastlake Charter for land use change, constitutes an unlawful delegation of legislative power to the electorate in violation of the Fourteenth Amendment to the United States Constitution.

The Decision of the Ohio Supreme Court, which significantly affects the right of the referendum in the City of Eastlake, as well as in seventeen (17) adjacent communities,[3] stands alone, as no other case can be found wherein the provisions for automatic referendum *itself* is found to be violative of the Federal Constitution.[4]

Thereupon, appeal was perfected to this Court.

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3. Seventeen communities in the greater Cleveland area, having a total population of 276,077, according to the 1970 population census, have adopted varying concepts of the automatic referendum procedure in respect to land use changes similar to the Eastlake provision.

4. The case of *Hunter v. Erickson*, 393 U.S. 385, involving the mandatory referendum provision of the City of Akron Charter, is readily distinguishable as the intent and purpose of the Akron law was found by the Court to be discriminatory against racial minorities. The automatic referendum voting process itself, as provided for by the Akron Charter, was not condemned. The Eastlake Charter referendum provision does not rest on "distinctions based on race" as in the *Hunter* case.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

1. The State Court relied upon and wrongly interpreted decisions of this Court in finding that the automatic referendum voting procedure provided for by the Eastlake Charter in respect to land use changes, is violative of the due process clause of the Federal Constitution.

The majority of the Ohio Supreme Court relied upon and wrongly interpreted the Decisions of this Court set forth in *Washington, ex rel. Seattle Trust Co. v. Roberge* (1928), 278 U.S. 116 (local consent requirement for philanthropic home); *Thomas Cassack Co. v. Chicago* (1917), 242 U.S. 526 (local restriction of signboards); and *Eubank v. City of Richmond* (1912), 226 U.S. 137 (local consent to street building line restriction), all of which cases involve the necessity for legislative procedural safeguards, where neighborhood land use restrictions are sought to be imposed. The procedural and substantive safeguards, to which reference is made in these cases, have no application where the voting issue is submitted to the electorate as a whole as provided for by the Eastlake Charter.

The referendum provided for by the Eastlake Charter is far more than an expression of neighborhood preference, it is the City itself, legislating through its voters, an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what best serves the public interest. See *Spaulding v. Blair* (4th Cir. 1968), 403 F.2d 862.

Respondent, Forest City Enterprises, Inc. made no challenge, nor does the record indicate, that the Eastlake Charter provisions discriminate against racial or economic

minorities.[5] Here, it is the claim that the local referendum procedure *itself*, which requires that questions be submitted to a vote of the electorate, violates the due process clause of the Federal Constitution. The question in this case is whether the mere requirement that a question be put to the electorate violates the Constitution.

2. The Decision of the State Court is in conflict with the principles of this Court decided in James v. Valtierra, 402 U.S. 137 (1971).

The Ohio Constitution, since 1912, has reserved to the people of each municipality the power of referendum on all questions involving legislative action, together with all powers of local self-government.[6]

In Ohio, the power to zone, or to change land use zoning classification, is a legislative function. *Donnelly v. Fairview* (1968), 13 Ohio St. 2d 1 and as such, is subject to the referendum process. *Hilltop Realty v. South Euclid* (1960), 110 Ohio App. 535. The referendum process of a municipal corporation may be determined by its local Charter provisions which may be less restrictive, or more restrictive than the procedure established by general law

5. Respondent, Forest City Enterprises, Inc., in its brief in the lower court, stated that it does not challenge the Eastlake Charter provision on any basis dealing with discrimination, intent, effect, or express provision against racial or economic minorities.

Claim that the Eastlake Charter provision interfered with "National Housing policies" and "Constitutional rights of travel" were brought into the case for the first time in an Amicus Curiae brief filed by "Lawyers for Housing" in the Ohio Supreme Court.

6. The Constitution of the State of Ohio, Article II, Section 1(f) provides, "* * * referendum powers are hereby reserved to the people of each community on all questions which such municipalities may now or hereafter be authorized to control by legislative action * * *" who may, under Section 7 thereof, "frame and adopt or amend a charter for its government and * * * exercise thereunder all powers of local self government."

for its procedure for submission of referendum vote to its electors. *State ex rel. Bramblette v. Yordy* (1970), 24 Ohio St. 2d 147.[7]

The same mandatory referendum procedure was at issue in *James v. Valtierra* (1971), 402 U.S. 137, whereby the State of California by constitutional amendment reserved to the electors of its counties and cities the power of referendum over the acts of its local government bodies in respect to low rent housing.

This Court, in sustaining the automatic referendum procedure, found that such provisions for referendum, which are neutral in application to all electors in the community demonstrates devotion to democracy and ensures that all the people of a community will have a voice in a decision which will affect the future development of their own community, and that such referendum procedure does not violate the Federal Constitution. The principles of this Court set forth in the *Valtierra* case clearly control in the instant case.

3. Referendum is a fundamental part of the local legislative process and, being founded on neutral principles, should be exempt from Federal Constitutional restraint.

The majority of the Ohio Supreme Court, in its Decision and Opinion, determined that the inquiry is "whether Eastlake's mandatory referendum provision allows the exercise of legislative power by the voting public such

7. The Supreme Court of Ohio made no finding that the automatic referendum voting provision of the Eastlake Charter was invalid as contrary to the general laws and referendum provisions of the Ohio Constitution as urged by Forest City Enterprises, respondent herein.

that zoning regulations *might* be imposed which are arbitrary and unreasonable." (Italics supplied.)

Respondent, Forest City Enterprises, Inc. did not claim, and the Court did not determine, that the land use restrictions as applied to respondent's particular property by the City of Eastlake were unreasonable, arbitrary or confiscatory.

Land use decisions, in the first instance, are political in nature and entrusted to local control under the political powers, and if reasonable, do not take property without due process of law. *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365. If, after the final decision has been made (by counsel, or by automatic referendum vote of the electorate), the restrictions placed upon respondent's property are unreasonable, then a Court challenge may be based upon the applicable specific facts as decided by this Court in the *Ambler Realty* case.

The referendum procedure is a fundamental part of the State's legislative process and, being founded on neutral principles, should be exempt from federal constraints. *Ranjel v. Lansing*, 417 F.2d 321, 324, cert. den. 397 U.S. 980 (1969).

The judgement of the State Court below places in jeopardy the democratic process whereby the electors reserve unto themselves the right of veto of the legislative acts of their elected officials as to land use changes by which the future development of their City will be determined (*James v. Valtierra, supra*), including the enjoyment of environmental land use planning (*Southern Alameda Spanish Speaking Organization v. City of Union City, Cal.*, 424 F.2d 291 (1970) and the protection and improvement of the quality of life of its residents (*Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

The issue in this case transcends zoning. The assault on the referendum process provided for by the Eastlake Charter is a manifestation of a new distrust of democracy and democratic processes in favor of an elitism that considers itself a wiser guide for the solution of economic and social policies, an elitism contemptuous of the wisdom and fairness of the ordinary voter who, it is claimed, *might* impose unreasonable restrictions on respondent's property. This distrust is disturbing as it seizes on the "due process clause" to denounce a neutral and traditional democratic process itself as being prohibited by the Federal Constitution.

The ultimate decision in this case will have far reaching effects, not only to the citizens of the City of Eastlake and numerous other adjacent municipalities directly affected, but also to other municipalities throughout the United States who may seek to control land use change by the automatic referendum voting procedure whereby the people elect to locally control the development of their community, in the first instance, by a mandatory vote of the electorate prior to any land use change becoming finally effective.

CONCLUSION

For the foregoing reasons, it is respectfully prayed that a writ of certiorari be issued to review the judgment and opinion of the Supreme Court of Ohio.

Respectfully submitted,

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APPENDIX A

Opinion of the Supreme Court of Ohio

(Decided March 19, 1975)

No. 73-901

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

FOREST CITY ENTERPRISES, INC.,
Appellant,

vs.

CITY OF EASTLAKE, *et al.*,
Appellees.

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1. Under Section 1f of Article II of the Ohio Constitution, municipal referendum powers are limited to questions which municipalities are "authorized by law to control by legislative action." (Paragraph one of the syllabus in *Myers v. Schiering*, 27 Ohio St. 2d 11, approved and followed.)

2. A municipal charter provision, which requires that any ordinance changing land use be ratified by the voters in a city-wide election, constitutes an unlawful delegation of legislative power, in violation of the due process clause of the Fourteenth Amendment to the United States Constitution.

Appellant is an Ohio corporation, and the owner of an 8-acre parcel of real property in Eastlake, Ohio. On May 18, 1971, appellant applied to the Eastlake Planning Commission for the rezoning of its property from industrial to multi-family, high-rise use. The Planning Commission approved the application, and on December 28, 1971, the Eastlake City Council amended Eastlake's comprehensive zoning ordinance to permit the requested use.

On April 6, 1972, appellant applied to the Planning Commission for parking and yard approval, a preliminary step to obtaining a construction permit. The Planning Commission denied the permit because appellant had failed to obtain voter approval of council's amendment to the comprehensive zoning ordinance, as required by Section 3, Article VIII of the Eastlake City Charter.[1] That provision requires any ordinance which changes existing land use to be approved by a 55 percent vote in a city-wide election, the cost to be borne by the applicant-landowner.

In May 1972, such an election was held, but the ordinance rezoning appellant's property failed to obtain the requisite 55 percent of the votes cast.

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1. On May 18, 1971, appellant made application to the Planning Commission for rezoning. While appellant's application was pending, initiative petitions were circulated, and a proposal requiring voter approval of all land use changes placed on the ballot. On November 2, 1971, Section 3, Article VIII of the Eastlake charter was adopted.

Subsequently, appellant's application was approved by the Planning Commission, and on December 28, 1971, city council amended the comprehensive zoning ordinance.

In the Court of Common Pleas, appellant contended that because Eastlake's charter was amended while appellant's application for rezoning was pending the charter amendment did not apply to appellant. The trial court rejected this contention, and appellant neither assigned the ruling as error nor argued it upon appeal.

Subsequently, appellant filed a declaratory judgment action in the Court of Common Pleas, asserting that Section 3 of Article VIII was unconstitutional. Appellant contended that the voter-approval requirement, as a prerequisite to any land use or zone change, denied appellant due process of law, and further, violated the referendum provisions of the Ohio Constitution. Appellant also attacked the validity of the provision requiring 55 percent approval and the provision requiring that election costs be borne by the applicant-landowner.

The Court of Common Pleas upheld the validity of the voter approval and 55 percent requirements, but held the provision requiring an applicant-landowner to pay the election costs unconstitutional. Upon appeal and cross-appeal the Court of Appeals affirmed the judgment of the Court of Common Pleas.

The cause is now before this court pursuant to the allowance of a motion to certify the record.[2]

PAUL W. BROWN, J. Appellant challenges the validity of Section 3, Article VIII of the Eastlake City Charter, which provides that no ordinance changing land use becomes effective until ratified by 55 percent of the voters in a city-wide election. Because such provision denies appellant due process of law, we hold it unconstitutional.

I

Since *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, the constitutionality of zoning has not been ques-

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2. Appellee did not file a cross-appeal from the judgment of the Court of Appeals. Thus, the Eastlake charter provision requiring an applicant-landowner to bear the costs of the mandatory election is not before us.

tioned. Modern authorities agree that some restrictions on the use of land are essential to orderly community development. But because the power to zone infringes upon the individual use of private property, the exercise of such authority has been carefully hedged with procedural and substantive safeguards. To be sustained as valid, a zoning ordinance must be comprehensive in nature, must bear a reasonable relationship to the public health, safety, welfare, or morals, and must provide for the amelioration of unnecessary hardships imposed upon the owners of specific property.

In Ohio, the power to zone or rezone, via the passage or amendment of a comprehensive zoning ordinance, is clearly a legislative function. *Berg v. Struthers* (1964), 176 Ohio St. 146; *Tuber v. Perkins* (1966), 6 Ohio St. 2d 155; *Donnelly v. Fairview Park* (1968), 13 Ohio St. 2d 1. See also, Justice Corrigan's concurrence in *Mobil Oil Corp. v. Rocky River* (1974), 38 Ohio St. 2d 23, 31. As such, the zoning or rezoning of property is subject to the referendum process. *Hilltop Realty v. South Euclid* (1960), 110 Ohio App. 535.

Grants of relief from unnecessary hardship, on the other hand, are classified as administrative acts, regardless of the label placed on them. *Donnelly v. Fairview Park, supra; Myers v. Schiering* (1971), 27 Ohio St. 2d 11. See also, Justice Corrigan's concurrence in *Mobil Oil Corp. v. Rocky River, supra.* This is so because the action executes or administers a zoning ordinance, rather than brings it into existence. *Donnelly v. Fairview Park, supra.* Whether such administrative relief is provided by council, acting in an administrative capacity, or by an administrative zoning board, created pursuant to R. C. 713.11, the proper route of appeal is to the Court of Common Pleas, via R. C. Chapter 2506. The power to referend an administrative zoning determination, by whatever body made, has long since been foreclosed. *Myers v. Schiering, supra.*

II

Section 3, Article VIII of the Eastlake charter sets forth the procedures prerequisite to a zone or land-use change in that city. Those procedures specifically govern "any change" in existing land use, or "any change whatsoever to any ordinance," or "the enactment of any ordinance," affecting the use of land. Several steps are required to effectuate a proposed change.

First, the proposed change must be submitted to the City Planning Commission which has the power to approve or disapprove the change. Next, regardless of the action taken by the Planning Commission, the proposal goes to city council, which may approve or disapprove. Finally, if the approval of council has been obtained, the proposed change must be ratified by 55 percent of the voters of Eastlake, at the next regular municipal election, or at a special election falling on the generally established election day. The cost of this required election, including the cost of the requisite advertising, must be borne by the applicant. In their briefs, and during oral argument, the parties have characterized the election requirement as a "mandatory referendum."

Under the provisions of Section 3, Article VIII, *all* changes in land use require approval by city council. On its face, the charter provision makes no distinction between those changes made by council in an administrative capacity, and those made by council in a legislative capacity. Thus, the requirement of a mandatory referendum falls upon all changes with equal weight. Insofar as this purports to mandate a referendum as to an administrative determination, it is clearly invalid. *Myers v.*

Schiering, supra; Kelley v. John (1956), 162 Neb. 319, 75 N.W.2d 713.

Paragraph one of the syllabus in *Myers* states: "Under Section 1f of Article II of the Ohio Constitution, municipal referendum powers are limited to questions which municipalities are 'authorized by law to control *by legislative* action.'"

However, construing the mandatory referendum requirement as applying only to those land-use changes granted by council acting in a legislative capacity, we must determine whether such a requirement denies appellant due process of law.

III

Appellant has not claimed, nor does the record indicate, that the zoning of appellant's 8-acre parcel for industrial use is unreasonable and unconstitutional. Rather, appellant's narrow claim is that Eastlake's charter provision constitutes a delegation of legislative power to the people, and *as such* violates the requirement that the police powers be exercised in a reasonable and unarbitrary fashion. The focus of our inquiry, then, is whether Eastlake's mandatory referendum provision allows the exercise of legislative power by the voting public, such that zoning regulations might be imposed which are arbitrary and unreasonable.

The Supreme Court of the United States has addressed this issue. In *Eubank v. Richmond* (1912), 226 U.S. 137; *Thomas Cusack Co. v. Chicago* (1917), 242 U.S. 526; and *Washington, ex rel. Seattle Title Trust Co. v. Roberge* (1928), 278 U.S. 116, that court established guidelines by which an appropriate due process determination might be made.

In *Eubank*, a Virginia statute authorized city and town councils to enact regulations concerning the building of houses, including the establishment of building lines. Pursuant to such authority, Richmond's city council passed an ordinance providing "that whenever the owners of two-thirds of the property abutting on any street shall, in writing, request the committee on streets to establish a building line on the side of the square on which their property fronts, the said committee shall establish such line * * *." Two-thirds of the property owners on plaintiff's block filed such a request, and a building line was subsequently established. When plaintiff challenged that action, the Virginia courts sustained both the statute and the ordinance, finding neither "unreasonable nor unusual."

The United States Supreme Court reversed, holding the ordinance to be an unlawful delegation of legislative power. In analyzing the facts, the court declared, at 226 U.S. 143-144:

> "It [the Richmond ordinance] leaves no discretion in the committee on streets as to whether the street line shall or shall not be established in a given case. The action of the committee is determined by two-thirds of the property owners. In other words, part of the property owners fronting on the block determine the extent of use that other owners shall make of their lots, and against the restriction they are impotent. This we emphasize. One set of owners determines not only the extent of use but the kind of use which another set of owners may make of their property. In what way is the public safety, convenience or welfare served by conferring such power? The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the property rights of others, creates no

standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously. Taste (for even so arbitrary a thing as taste may control) or judgment may vary in localities, indeed in the same locality. * * *

"We are testing the ordinance by its extreme possibilities to show how in its tendency and instances it enables the convenience or purpose of one set of property owners to control the property right of others, and property determined, as the case may be, for business or residence—even, it may be, the kind of business or character of residence. * * *"

In *Cusack*, a Chicago ordinance prohibited the erection of any billboard or signboard in any block "in which one-half of the buildings on both sides of the street are used exclusively for residence purposes without first obtaining the consent in writing of the owners * * * owning the majority of the frontage of the property on both sides of the street in any block in which such billboard or signboard is to be erected * * *." Plaintiff, relying on *Eubank*, challenged the ordinance as an unlawful delegation of legislative power, but the Supreme Court of Illinois upheld the enactment, and the United States Supreme Court affirmed.

The court drew a sharp distinction between *Eubank* and *Cusack*, because the facts presented were significantly different. In *Eubank*, a reasonable use of property was prohibited by arbitrary fiat; in *Cusack*, an unreasonable use of property was prohibited by valid legislative action, subject to said prohibition's being lifted by those affected. As the court noted, at 242 U.S. 531:

"* * * [the *Eubank* ordinance] left the establishment of the building line untouched until the lot owners should act and then made the street committee the mere automatic register of that action and gave it the effect of law. The ordinance in the case at bar absolutely prohibits the erection of any billboards in the blocks designated, but permits this prohibition to be modified with the consent of the persons who are to be most affected by such modification. The one ordinance permits two-thirds of the lot owners to impose restrictions upon the other property in the block, while the other permits one-half of the lot owners to remove a restriction from the other property owners. This is not a delegation of legislative power, but is, as we have seen, a familiar provision affecting the enforcement of laws and ordinances."

Finally, in *Washington, ex rel. Seattle Title Trust Co., v. Roberge*, the trustee of a philanthropic home sought to replace an existing building with a new and enlarged structure, sufficient in size to lodge 30 persons. A Seattle ordinance, amending the city's comprehensive zoning scheme, permitted the erection of the structure as contemplated, but made such approval subject to the trustee's obtaining the written consent "of the owners of two-thirds of the property within four hundred (400) feet of the proposed building." When the trustee failed to comply with the consent requirement, a permit to erect the new home was denied, and the validity of such action was affirmed by the state Supreme Court.

The United States Supreme Court reversed, holding that the consent requirement constituted an unlawful delegation of legislative power. The court distinguished *Cusack* by finding construction of the home in *Roberge* to be a reasonable use, subject to arbitrary prohibition via the

consent requirement, while the ordinance in *Cusack* prohibited an unreasonable use unless consent was given. At 228 U.S. 121-122, the court declared:

> "The right of the trustee to devote its land to any legitimate use is properly within the protection of the Constitution. The facts disclosed by the record make it clear that the exclusion of the new home from the first district is not indispensable to the general zoning plan. And there is no legislative determination that the proposed building and use would be inconsistent with public health, safety, morals or general welfare. The enactment itself plainly implies the contrary. The grant of permission for such building and use, although purporting to be subject to such consents, shows that the legislative body found that the construction and maintenance of the new home was in harmony with the public interest and with the general scope and plan of the zoning ordinance. The section purports to give the owners of less than one-half the land within 400 feet of the proposed building authority—uncontrolled by any standard or rule prescribed by legislative action—to prevent the trustee from using its land for the proposed home. The superintendent is bound by the decision or inaction of such owners. There is no provision for review under the ordinance; their failure to give consent is final. They are not bound by any official duty, but are free to withhold consent for selfish reasons or arbitrarily and may subject the trustee to their will or caprice. *Yick Wo v. Hopkins*, 118 U.S. 356, 366, 368. The delegation of power so attempted is repugnant to the due process clause of the Fourteenth Amendment. *Eubank v. Richmond*, 226 U.S. 137, 143. *Browning v. Hooper*, 269 U.S. 396."

The distinction to be drawn between the court's decisions in *Eubank* and *Roberge*, on the one hand, and the court's decision in *Cusack*, on the other, is this: A reasonable use of property, made possible by appropriate legislative action, may not be made dependent upon the potentially arbitrary and unreasonable whims of the voting public. Such a rule was announced by the Supreme Court of Delaware in *Myers v. Fortunato* (1920), 12 Del. Ch. 374, at page 375:

> "If the existence of the law depends upon the vote or act of the people it is an unconstitutional delegation of legislative power, but if the law is complete in and of itself the fact that it provides for the removal or modification of its prohibition by the act of those most affected thereby, does not make it a delegation of legislative power."

The facts in the present case parallel those in *Roberge*. Here, the city council of Eastlake, by appropriate legislative action, permitted the use of appellant's 8-acre parcel for multifamily high-rise apartments. But before such ordinance and the use there allowed could become effective, appellant was required to obtain the consent of 55 percent of Eastlake's voting public, in a mandatory referendum. No standards were established whereby that action would be reasonable, rational and unarbitrary. Nor, indeed, could any be. Applying the principles enunciated by the Supreme Court, the Eastlake referendum requirement denied appellant due process of law.

Due process of law requires that procedures for the exercise of municipal power be structured such that fundamental choices among competing municipal policies are resolved by a responsible organ of government. It also requires that a municipality protect individuals against

the arbitrary exercise of municipal power, by assuring that fundamental policy choices underlying the exercise of that power are articulated by some responsible organ of municipal government. *McGautha v. California* (1971), 402 U.S. 183, 256, 270. The Eastlake charter provision ignored these concepts and blatantly delegated legislative authority, with no assurance that the result reached thereby would be reasonable or rational. For these reasons, the provision clearly violates the due process clause of the Fourteenth Amendment.[3]

IV

To support its proposition that Section 3, Article VIII of its charter is constitutional, appellee cites *James v. Valtierra* (1971), 402 U.S. 137. That case concerned a state constitutional provision requiring that no low-rent housing project be developed, constructed, or acquired by a state public body until approved by a majority of those voting at a community election. The Supreme Court upheld the validity of the provision, as an appropriate exercise in "democratic decisionmaking."

Reliance on *Valtierra*, as authority in this case, is misplaced. *Valtierra* did not concern zoning, but rather the approval or disapproval of low-rent public housing. The court deemed such a decision to properly involve community-wide policy-making and compared the requirement to similar mandatory referendums for approval of state con-

3. This holding makes is unnecessary to reach appellant's further contention that a cumbersome zoning process bears no rational relationship to a valid police power objective. In *Burt Realty Corp. v. Columbus* (1970), 21 Ohio St. 2d 265, we held that unnecessarily onerous administrative remedies need not be exhausted prior to seeking declaratory relief. A time-consuming and costly appellate process, designed solely to delay and discourage land-use changes, would present grave constitutional questions.

stitutional amendments, for the issuance of general obligation long-term bonds by local governments, and for certain municipal territorial annexation. At page 143, the court declared: "This procedure ensures that all the people of a community will have a voice in a decision which may lead to large expenditures of local governmental funds for increased public services and to lower tax revenues."

It can scarcely be contended that every proposed land use change, no matter how small, in a city with a population of 20,000, either involves or allows community-wide policy-making. Rather, most involve hardships affecting individual parcels of property, which must be alleviated to preserve the constitutional validity of the ordinance.

Appellees also cite R. C. 303.11, 303.12, 519.11 and 519.12, which provide for county and township zoning. R. C. 303.11 provides that a comprehensive zoning resolution, adopted by the county commissioners, shall not become effective until approved by a majority of the voting public. R. C. 303.12 provides that amendments or supplements to such resolutions become effective 30 days after adoption, unless petitions are signed by a requisite number of resident voters, requesting that such change be placed on the ballot. R. C. 519.11 and 519.12 contain similar provisions with regard to township zoning.

Those statutes are of no help in deciding the present case. The imposition of zoning in a state's rural area is a matter of substantial significance, restricting severely the individual use of land, and determining, perhaps permanently, the direction of future development. As such, it clearly involves that type of policy decision justifying approval by those affected. Amendments to rural zoning ordinances, on the other hand, are not subject to manda-

tory voter approval, but rather to permissive referendum elections, when a substantial number of resident voters feel sufficiently aggrieved to circulate the appropriate petitions. Such provision contrasts sharply with the Eastlake charter, and thus is free from the deficiencies implicit in an unlawful delegation of legislative power.

We hold that the mandatory referendum provision of Section 3, Article VIII of the Eastlake charter constitutes an unlawful delegation of legislative power, thereby denying appellant due process of law. Whether the zoning of appellant's property for industrial use is reasonable, or whether the city of Eastlake has unlawfully attempted to exclude low and moderate income housing,[4] we do not decide. The judgment of the Court of Appeals, affirming the validity of the mandatory referendum and 55 percent approval provisions of the Eastlake charter, is reversed.

Judgment reversed.

O'NEILL, *C. J.*, HERBERT, STERN and W. BROWN, *JJ.*, concur.

CORRIGAN and CELEBREZZE, *JJ.*, dissent.

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4. An *amicus curiae* brief, filed by Lawyers for Housing, contends that Eastlake's mandatory referendum provision, and those of other cities, is designed to exclude low and moderate income housing entirely. Whether provisions so designed would be unreasonable and unlawful would depend upon the facts in each individual case. See *Belle Terre v. Boraas* (1974), 416 U.S. 1. The record herein justifies no finding, one way or the other, in this regard.

STERN, *J.*, concurring. In the instant case, the majority ably points out the basic legal deficiencies of the Eastlake charter provision. The broader issues raised by this action also, I believe, require comment.

Almost half a century ago, in the landmark case of *Euclid v. Ambler Realty Co.* (1926), 272 U.S. 365, the United States Supreme Court affirmed the validity of a community zoning ordinance which restricted the use of private land, and the court recognized that such restrictions were necessary to the welfare of complex urban Communities. As Mr. Justice Sutherland stated: "* * * Regulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even a half century ago, probably would have been rejected as arbitrary and oppressive." 272 U.S., at 387. In that case, the village of Euclid, by its zoning ordinance, restricted industrial development to nonresidential areas, and the court approved, stating: "If it be a proper exercise of the police power to relegate industrial establishments to localities separated from residential sections, it is not easy to find a sufficient reason for denying the power because the effect of its exercise is to divert an industrial flow from the course it would follow, to the injury of the residential public if left alone, to another course where such injury will be obviated. *It is not meant by this, however, to exclude the possibility of cases where the general public interest would so far outweigh the interest of the municipality that the municipality would not be allowed to stand in the way.*" (Emphasis added.) 272 U.S., at 389, 390.

Present-day conditions raise new issues also requiring the weighing of the general public interest against the interest of a municipality.

There can be little doubt of the true purpose of Eastlake's charter provision—it is to obstruct change in land use, by rendering such change so burdensome as to be prohibitive. The charter provision was apparently adopted specifically, to prevent multi-family housing, and indeed was adopted while Forest City's application for rezoning to permit a multi-family housing project was pending before the City Planning Commission and City Council. The restrictive purpose of the provision is crudely apparent on its face. Any zoning change, regardless of how minor, and regardless of its approval by the Planning Commission and the City Council, must be approved by a city-wide referendum. The proposed change must receive, rather than a simple majority, at least a 55 percent affirmative vote. Finally, the owner of the property affected is required to pay the cost of the election, although the provision gives no hint as to exactly which costs would be billed to a property owner.

There is no subtlety to this; it is simply an attempt to render change difficult and expensive under the guise of popular democracy.

Even stripped of its harsher provisions the charter provision poses serious problems. A mandatory, city-wide referendum which applies to any zoning change must, of necessity, submit decisions that affect one person's use of his property to thousands of voters with no interest whatever in that property. We need only imagine the adoption of this same provision in a city such as Cleveland. By such a provision, rezoning for a corner gasoline station would require the approval of hundreds of thousands of voters, most of them living miles away, and few of them with the slightest interest in the matter. This would be government by caprice, and would seriously dilute the right of private ownership of property. The law recog-

nizes that the use a person makes of his property must inevitably affect his neighbors and, in some cases, the surrounding community. These real interests are entitled to be balanced against the rights of a property owner; but a law which requires a property owner, who proposes a wholly benign use of his property, to obtain the assent of thousands of persons with no such interest, goes beyond any reasonable public purpose.

Zoning provisions such as that in Eastlake's charter have a single motive, and that is to exclude, to build walls against the ills, poverty, racial strife, and the people themselves, of our urban areas. The struggles of our suburbs to build such walls can be seen in cases throughout the county. See, Note, Removing the Bar to Exclusionary Zoning to a Decent Home, 32 Ohio St. L. J. 373; *Concord Township Appeal* (1970), 439 Pa. 466, 268 A.2d 765. Cf. *Matter of Golden v. Planning Bd. of Ramapo* (1972), 30 N.Y.2d 359, 285 N.E.2d 291. In the suburbs surrounding the city of Cleveland, the requirement of mandatory referendums for approval of zoning changes has been adopted by over a dozen communities; some of these communities have provisions which specifically apply to any zoning change to permit multi-family or low-income housing. The inevitable effect of such provisions is to perpetuate the de facto divisions in our society between black and white, rich and poor. As one commission report has pointed out: "The people of the slums are the symptoms of the urban problem, not the cause. They are virtually imprisoned in slums by the white suburban noose around the inner city, a noose that says 'Negroes and poor people not wanted.'" National Commission on Urban Problems, Building the American City, 1 (1968). The exercise of the police power through zoning cannot be permitted where its sole purpose is to tighten that noose.

Zoning, and other forms of urban planning, are even more fundamental and necessary today than they were nearly fifty years ago when *Euclid v. Ambler Realty Co.* was decided, for our cities are far more populous and our problems far more complex. Certainly there is no simple solution to the problem of planning a community's development so that it be healthy, well-balanced, and just. "* * * [Z]oning is a complex and important function of the state. It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life." *Belle Terre v. Boraas* (1974), 416 U.S. 1, 13 (Marshall, J., dissenting).

The importance of zoning makes imperative the prevention of its abuse or of its application to systematically perpetuate inequity.

I can perceive no proper public purpose which would justify the burdensome nature of the Eastlake charter provision, or would suggest that it represents planning for the community's needs rather than simple resistance to change and exclusion of persons of low and middle income. Accordingly, I agree with the majority that the charter provision involved herein is invalid, and concur in the opinion and judgment.

O'NEILL, C. J., HERBERT and W. BROWN, JJ., concur in the foregoing concurring opinion.

CORRIGAN, J., dissenting. This appeal brings into question the validity of the provision of Section 3, Article VIII of the Charter of the city of Eastlake, which provides that zoning ordinances shall not be effective until "approved by a 55% favorable vote of all votes cast of the qualified electors * * * at the next regular municipal election."

It is appellant's position that this charter provision "is invalid as contrary to the Constitutions of the United States and the state of Ohio because it deprives a property owner of his property without due process of law" and that it "is invalid as contrary to the referendum provisions of the Ohio Constitution."

Appellant argues that due process of law entitles it "to have its use of its real property controlled by a responsible legislative organ of government, and not to the uncontrolled whim of a *minority* of its neighbors." *Eubank v. Richmond* (1912), 226 U.S. 137, is cited by appellant. In that case, the city ordinance provided for the establishment of building lines by the committee on streets upon written request by the owners of two-thirds of the property abutting a street. The court found the ordinance to be "an unreasonable exercise of the police power," stating, at pages 143-144: "The statute and ordinance, while conferring the power on some property holders to virtually control and dispose of the proper rights of others, creates no standard by which the power thus given is to be exercised; in other words, the property holders who desire and have the authority to establish the line may do so solely for their own interest or even capriciously. * * *"

Appellant notes that *Eubank* was distinguished in *Thomas Cusack Co. v. Chicago* (1917), 242 U.S. 526. There, an ordinance permitted erection of billboards upon the consent of the owners of a majority of the frontage of the property on both sides of the street in the block where the billboard was to be erected. It was argued that this constituted "* * * a delegation of legislative power to the owners of a majority of the frontage of the property in the block 'to subject the use to be made of their property by the minority owners of property in such block to the whims and caprices of their neighbors.' "

In upholding the validity of the ordinance, the court said, at page 531:

> "The plaintiff in error relies chiefly upon *Eubank v. Richmond*, 226 U.S. 137. A sufficient distinction between the ordinance there considered and the one at bar is plain. The former left the establishment of the building line untouched until the lot owners should act and then made the street committee the mere automatic register of that action and gave to it the effect of law. The ordinance in the case at bar absolutely prohibits the erection of any billboards in the blocks designated, but permits this prohibition to be modified with the consent of the persons who are to be most affected by such modification. The one ordinance permits two-thirds of the lot owners to impose restrictions upon the other property in the block, while the other permits one-half of the lot owners to remove a restriction from the other property owners. This is not a delegation of legislative power, but is, as we have seen, a familiar provision affecting the enforcement of laws and ordinances."

Cusack was commented upon in *Valkanet v. Chicago* (1958), 13 Ill. 2d 268, 272, 148 N.E.2d 767, wherein the court said:

> "While the *Cusack* decision has been criticized (University of Illinois 1954 Law Forum, 309, 311-312), it has been generally followed. And, even though it is impossible to lay down a hard-and-fast rule, we conclude that if an ordinance permits a certain percentage of the property owners to impose or create a restriction upon their neighbors' property by the devise of consent provisions, such limitation constitutes an invalid delegation of legislative power, but if the consent provision merely waives or modifies a lawful

> and reasonable legislative restriction or prohibition, it is within constitutional limitations. * * *"

On the issue raised in the above-cited cases, this court, in paragraph three of the syllabus of *State, ex rel. Standard Oil Co. v. Combs* (1935), 129 Ohio St. 251, held:

> "An ordinance requiring written consents of fifty-one per cent of the property owners in a residential district within a radius of six hundred feet from a filling station, as a prerequisite to its installation, is not a delegation of legislative power conferred by council upon such property owners; and such consent provisions are not repugnant to our state or federal constitutions. (*Cincinnati, W. & Z. Rd. Co. v. Commrs. of Clinton County*, 1 Ohio St. 77, approved and followed; *City of Canton v. Mid-Continent Producers & Refiners Corp.*, 115 Ohio St. 705, overruled.)"

The foregoing decisions are distinguishable from the instant case. Here, we are concerned with a referendum on a zoning ordinance which is submitted to the electorate of the municipality.

Facts similar to those appearing in this cause were before the court in *Southern Alameda Spanish Speaking Organization v. Union City* (C. A. 9, 1970), 424 F.2d 291. There, a city-wide referendum nullifying a zoning ordinance rezoning certain land was upheld. As to a contention that the "referendum zoning" violated due-process requirements, the court said, at page 294:

> "Appellants initially challenge the constitutionality of California's referendum procedures as applied to the zoning process. They contend that 'referendum zoning' violates due process requirements.
>
> "The rights asserted are those of a landowner (SASSO) to be free from arbitrary restrictions on

land use. Appellants assert that regulation of land use by zoning is constitutionally permissible only where procedural safeguards assure that the resulting limitations have been determined, by legislatively promulgated standards, to be in the interest of public health, safety, morals, or the general welfare. They contend that the referendum process destroys the necessary procedural safeguards upon which a municipality's power to zone is based and subjects zoning decisions to the bias, caprice and self-interest of the voter. They rely on *Washington, ex rel. Seattle Title Trust Co. v. Roberge,* 278 U.S. 116, 49 S. Ct. 50, 73 L. Ed. 210 (1928), and *Eubank v. City of Richmond,* 226 U.S. 137, 33 S. Ct. 76, 57 L. Ed. 156 (1912).

"Appellants' reliance on these cases is misplaced. There, local ordinances permitted residents of a neighborhood, by majority vote (*Eubank*) or by withholding consent (*Washington*), to impose restrictions that otherwise had not legislatively been determined to be in the public interest. The resulting rule, as applied to appellants' contentions respecting procedural safeguards, would seem to be that an expression of neighborhood preference for restraints, uncontrolled by any legislative responsibility to apply acceptable public interest standards, is not such a determination of what is in the public interest as will justify an exercise of the police power to zone.

"A referendum, however, is far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters—an exercise by the voters of their traditional right through direct legislation to override the views of their elected representatives as to what serves the public interest. See *Spaulding v. Blair,* 403 F.2d 862

(4th Cir. 1968). This question lay at the heart of the proposition put to the voters. That some voters individually may have failed to meet their responsibilities as legislators to vote wisely and unselfishly cannot alter the result.

"Nor can it be said that the resulting legislation on its face was so unrelated to acceptable public interest standards as to constitute an arbitary or unreasonable exercise of the police power. See *Washington, ex rel. Seattle Title Trust Co. v. Roberge, supra; Eubank v. Richmond, supra; Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395, 47 S. Ct. 114, 71 L. Ed. 303 (1926). Many environmental and social values are involved in a determination of how land would best be used in the public interest. The choice of the voters of Union City is not lacking in support in this regard.

> "Thus in the present case neither the zoning process itself nor the result can be said to be such an arbitrary or unreasonable exercise of the zoning power as to be violative of appellants' right to due process of law. * * *"

In my opinion, the foregoing reasoning is persuasive and I would hold that the submission of a zoning ordinance to the electorate of a municipality is not violative of due process.

Examination of the statutes reveals that submission of zoning resolutions to electors by referendum is not an innovative concept. R. C. 303.11 provides for submission of zoning resolutions adopted by a board of county commissioners to the "electors residing in the unincorporated area of the county included in the proposed plan of zoning for their approval or rejection. * * *"

R. C. 519.11 provides for submission of zoning resolutions adopted by a board of township trustees "to the electors residing in the unincorporated area of the township included in the proposed plan of zoning for their approval or rejection * * *."

In each statute the zoning regulations become effective only if a majority of the vote cast on this issue is in favor of the proposed plan.

R. C. 303.12 and 519.12 provide for referendum votes on amendments or supplements to county or township zoning resolutions respectively.

R. C. 519.12 was brought into question in *Cook-Johnson Realty Co. v. Bertolini* (1968), 15 Ohio St. 2d 195. As to the constitutionality of that section, it was said, at pages 200-201:

> "What the General Assembly has done in Section 519.12, Revised Code, is to provide the people of the several townships with a power to veto, by use of the device of referendum, zoning resolutions passed by township trustees.
>
> "We find no constitutional impediment to a grant of legislative power by the General Assembly to township trustees to make zoning resolutions, nor for the General Assembly to reserve the power of referendum to the people who will be affected by such resolutions. Therefore, Section 519.12, Revised Code, insofar as it accomplishes these purposes of the General Assembly, is constitutional."

In *State ex rel. Bramblette v. Yordy* (1970), 24 Ohio St. 2d 147, this court noted, at page 150:

> "In providing for referendum, however, a municipal charter is not restricted to the adoption of the same provisions enacted by the General Assembly. It may be less restrictive as to use of the referendum, as was the Charter of the city of Toledo which authorized referendum on all ordinances, including one levying a tax passed as an emergency measure. *State ex rel. Snyder v. Bd. of Elections* (1946), 78 Ohio App. 194. It may be more restrictive, as in *Dillon v. Cleveland, supra* (117 Ohio St. 258), where a referendum would have been required under state law, but was not required under the provisions of the Charter of the city of Cleveland."

When the above-stated principles from *Cook-Johnson Realty Co.* and *Bramblette, supra,* are applied to the instant cause, it is clear that the referendum provisions of the city charter in question are not "invalid as contrary to the referendum provisions of the Ohio Constitution."

The fact that the charter section in question requires "a 55% favorable vote of all votes cast" does not, in my opinion, stand as an impediment to the constitutional validity of the referendum procedure established by the charter. Similar restrictive election requirements can be found in the statutes, *e. g.*, R. C. 139.02 (for issuance of federal aid bonds); R. C. 133.16 (for issuance of bonds for reconstruction of bridges); R. C. 1515.04 (creation of soil and water conservation district); and R. C. 5705.191 (approval of excess tax levy).

To particularize, I would hold in this case that the mandatory referendum provision of Section 3, Article VIII of the Eastlake charter, does not constitute an unlawful delegation of legislative power and does not deny to the appellant its constitutional right to due process of law. Accordingly, I would affirm the judgment of the Court of Appeals.

CELEBREZZE, J., concurs in the foregoing dissenting opinion.

APPENDIX A (Continued)

Orders of the Supreme Court of Ohio

No. 73-901

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS

FOREST CITY ENTERPRISES, INC.,
Appellant,

vs.

CITY OF EASTLAKE, *et al.*,
Appellees.

APPEAL FROM THE COURT OF APPEALS
FOR LAKE COUNTY

(Entered March 19, 1975)

This cause, here on appeal from the Court of Appeals for Lake County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals affirming the validity of the mandatory referendum and 55 percent approval provisions of the Eastlake charter, is reversed, for the reasons set forth in the opinion rendered herein.

It is ordered and adjudged also that appellant recover from appellee its costs expended in this Court; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Lake County for entry.

• • • • •

(Caption as above)

REHEARING

(Entered April 17, 1975)

It is ordered by the court that rehearing in this case is denied.

APPENDIX B

Opinions of the Court of Appeals

(Dated July 23, 1973)

No. 263

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT OF OHIO,
LAKE COUNTY

FOREST CITY ENTERPRISES, INC.,
Plaintiff-Appellant,

vs.

THE CITY OF EASTLAKE, *et al.*,
Defendants-Appellees.

OPINION OF THE COURT OF APPEALS
AS TO THE APPEAL

This cause came on to be heard upon the record in the Trial Court, and was briefed and argued by counsel for the parties. Upon consideration whereof, this Court finds no error prejudicial to the appellant and, therefore, the judgment of the Trial Court is affirmed. Each assignment of error was reviewed and upon review the following disposition was made:

This is an appeal from a judgment of the Common Pleas Court.

The facts are not in dispute. Plaintiff-appellant owns certain property in the City of Eastlake. Prior to May 18, 1971 it was zoned for limited industrial use. On May 18, 1971 appellant filed an application for a change in the zoning to multi-family high rise use. The application was processed by the City Planning Commission and City Council and finally the change in zoning classification was approved by Council in Ordinance 1971-168.

Article VIII, Section 3 of the Charter of the City of Eastlake provides that no ordinance dealing with zoning, land use or development shall take effect until after a mandatory referendum election is held at which the ordinance receives a 55% affirmative vote, the cost of the election being borne by the owner of the real property affected.

The sole question before this court is whether Article VIII Section 3 of the Charter of the City of Eastlake is constitutional.

The answer is yes.

Article II Section 1f of the Ohio Constitution states:

> "The initiative and referendum powers are hereby reserved to the people of each municipality on all questions which such municipalities may now or hereafter be authorized by law to control by legislative action; *such powers shall be exercised in the manner now or hereafter provided by law.*" (Italics ours)

RC 731.29 reads as follows in pertinent part:

> "Any ordinance or other measure passed by the legislative authority of a municipal corporation shall

> be subject to the referendum except as provided by section 731.30 of the Revised Code. No ordinance or other measure shall go into effect until thirty days after it is filed with the mayor of a city or passed by the legislative authority in a village, except as provided by such section.
>
> "When a petition, signed by ten per cent of the number of electors who voted for governor at the next preceding general election for the office of governor in the municipal corporation, is filed with the city auditor or village clerk within thirty days after any ordinance or other measure is filed with the mayor or passed by the legislative authority of a village, ordering that such ordinance or measure be submitted to the electors of such municipal corporation for their approval or rejection, such auditor or clerk shall, after ten days, and not later than four p.m. of the ninetieth day before the day of the election, certify the petition to the board of elections. . . ."

Article VIII Section 3 of the Eastlake Charter states in pertinent part as to zoning amendments:

> ". . . . . That in the event the city council should approve any of the preceding changes, or enactments, whether approved or disapproved by the Planning Commission it shall not be approved or passed by the declaration of an emergency, and it shall not be effective, but it shall be mandatory that the same be approved by a 55% favorable vote of all votes cast of the qualified electors of the City of Eastlake at the next regular municipal election. . . . . ."

A cursory reading of RC 731.29 and Article VIII Section 3 of the Charter of Eastlake clearly reveals that RC 731.29 requires a petition signed by ten per cent of the num-

ber of electors who voted for governor at the next preceding election for the office of governor in the municipal corporation as a prerequisite to submitting a referendum on a municipal ordinance to the voters of the municipality whereas Article VIII Section 3 of the Eastlake Charter requires no petitions signed by electors of the City of Eastlake as a prerequisite to a referendum on a zoning change ordinance, in fact requires a mandatory referendum on every zoning change ordinance approved by council.

RC 731.41 states:

> "Sections 731.28-731.41, inclusive, of the Revised Code do not apply to any municipal corporation which adopts its own charter containing an initiative and referendum provision for its own ordinances and other legislative measures."

The Supreme Court of Ohio held in *State ex rel. Bramblette v. Yordy*, 24 OS 2d 147 on page 150:

> "In providing for referendum, however, a municipal charter is not restricted to the addition of the same provisions enacted by the General Assembly. It may be less restrictive as to use of the referendum, as was the Charter of the City of Toledo which authorized referendum, on all ordinances, including one levying a tax passed as an emergency measure, State ex rel. Snyder vs. Bd. of Elections (1946), 78 O App 194. It may be more restrictive, as in Dillon v. Cleveland, supra 117 Ohio St. 258, where a referendum would have been required under said law, but was not required under the provisions of the Charter of the City of Cleveland."

Therefore, we are of the opinion that that portion of Article 2 Section 1f of the Ohio Constitution which says

that "such powers shall be exercised in the manner now or hereafter provided by law" refers to the provisions of a municipality's charter if said charter has provisions for initiative and referendum relative to its own ordinances or, where there are no charter provisions, the exercise of such power is only provided for by the General Assembly.

In the instant case, the charter of the City of Eastlake provides for a referendum on all ordinances containing zoning changes, a provision which is "less restrictive as to the use of the referendum", but which is a permitted provision of the charter "law" under the "home rule" provisions of the Constitution.

In our opinion, Article VIII Section 3 of the Eastlake Charter is not in conflict with Article 2 Section 1f of the Ohio Constitution. In fact, Article VIII Section 3 of the Eastlake Charter is permitted under Article XVIII Section 3 in the Ohio Constitution.

Judgment affirmed.

ROBERT E. COOK
Judge

JONES, *P.J.*

HOFSTETTER, *J.*, concur.

OPINION OF THE COURT OF APPEALS AS TO THE CROSS APPEAL

(Dated August 27, 1973)

COOK, *J.*

Coming now to the cross appeal of the appellees, City of Eastlake, et al., which states that "the portion of the

judgment of the Court of Common Pleas, which found unconstitutional the provision of the Eastlake Charter Amendment requiring assessment of the costs of election to the effected [sic] property owner is contrary to law".

In our opinion, the trial court should be affirmed as to its conclusion that the portion of the Eastlake charter that assesses the cost of referendum on a proposed zoning change to the applicant is unconstitutional.

In State, ex rel., Ayres, 142 OS 216, the Supreme Court of Ohio held:

> "Under the mandatory provisions of Section 2, Article X and Section 1, Article XVII of the Constitution of Ohio, and the statutes passed pursuant thereto, all matters pertaining to the conduct of election are state functions."

Pursuant to said constitutional provision the legislature of the State of Ohio enacted RC 3501.17 in which it provided that the costs of special elections held either on the regular primary or general election days or on a day other than the day of a primary or general election should be charged to the political subdivision involved.

Therefore, any provision in a charter of a municipality attempting to assess the cost of an election for a referendum on a proposed zoning change to the applicant is in violation of the Ohio Constitution and RC 3501.17.

Judgement on cross appeal is affirmed.

JUDGE ROBERT E. COOK

JONES, *P.J.*

HOFSTETTER, *J.*, concur

APPENDIX C

Opinion of the Court of Common Pleas

(Dated October 27, 1972)

No. 72 Civ. 0219

IN THE COURT OF COMMON PLEAS
STATE OF OHIO, LAKE COUNTY, SS.

FOREST CITY ENTERPRISES, INC.,
Plaintiff,

vs.

THE CITY OF EASTLAKE *et al.*,
Defendants.

OPINION

Plaintiff is the owner of real property located in the City of Eastlake and sought to have the property rezoned from limited industrial to multi-family high rise.

An application for such rezoning was filed on May 18, 1971 and on December 28, 1971 Council of the City of Eastlake enacted an Ordinance providing the necessary zoning change.

However, on November 2, 1971 the voters of the City of Eastlake adopted Art. VIII, Section 3 of their Charter which provided that any Ordinance changing any zoning or land use in the City must be submitted to the voter and receive a 55% affirmative vote.

The Ordinance in question did not receive the necessary votes and brings this action challenging the constitutionality of the Charter Amendment.

The first challenge is that the provision of the Charter may not be applied to property such as the plaintiff's as their application was pending when the Amendment to the Charter was adopted.

Plaintiff cites a number of cases where zoning was changed after application was made for a permit, such is not the case here. The zoning has not been changed and the effect of the Charter Amendment is to change the methods to obtain a change.

The next challenge is that the Amendment offends both the Federal and State Constitution as follows:

1. It constitutes an improper abdication of the legislative duties of Council, citing, *James v. Valtierra,* 402 U.S. 137. This Court is of the opinion that this case tends to establish the right of the City to adopt such a Charter Amendment. There is no question that the adoption of zoning requirement is a legislative act. But that is not what this Amendment does. What it does do, is preserve to the electors of Eastlake, the right to review the legislation adopted by their Planning Commission and their Council.

The next challenge is that the Amendment is violate [sic] of the due process clause.

A) The need to refer for a referendum without standard or criteria. The Court has already pointed out that the Council retains the standards and make the change, the people merely adopt or reject the Ordinance as submitted, they do not create the legislation.

The next challenge is the 55% requirement of the Amendment but cites no authority for this claim.

The next claim is the assessment of the costs of the election to the property owner. The Court is of the opinion that such provision is unconstitutional.

It is true that the Amendment refers to the applicant but suppose the change proposed to be made is originated by the Planning Commission who then is the applicant, or if the change proposed affects others than the applicant. This would not, however invalidate the balance of Amendment.

The defendant further argues that by reason of the Amendment it would be subject to arbitrary and unreasonable action. No such evidence was presented to this Court, if such facts do in fact exist, the Court would still be available to grant relief in such cases.

Lastly, the plaintiff charges that the Amendment offends the referendum provisions of the Ohio Constitution. No citation or other authority is offered in support of this contention.

A somewhat similar mandatory referendum requirement was approved by the U. S. Supreme Court in *Shaffer v. Veltierra,* 402 U.S. 137, see also, *Hunter v. Erickson,* 393 U.S. 385.

The Court makes no comment on the wisdom of what appears to be a cumbersome method of changing zoning to meet changing times.

The Court is of the opinion that the presumption of the validity of Amendment must prevail and declares the amendment to be constitutional except as to the assessment of costs of the election.

Prevailing counsel will prepare a judgment entry in accordance with this opinion and the Rules of this Court.

JOHN F. CLAIR, JR.
Judge of the Court of Common Pleas

APPENDIX D

Charter of the City of Eastlake

ARTICLE I

Preamble

We, the people of the City of Eastlake, in the County of Lake, and State of Ohio, within the boundaries, as now established in the manner provided by the laws of the State of Ohio, and as incorporated in this charter do hereby adopt this Charter for the government of the City of Eastlake in order to secure the benefits of municipal home rule and to exercise all the powers of local self-government under the Constitution and the Laws of the State of Ohio.

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Section 2. Powers

The municipality shall have all the powers of local self-government now or hereafter granted to municipalities by the Constitution of the State of Ohio, and such further powers as are now or hereafter granted by the Laws of the State of Ohio; and all such powers shall be exercised in the manner prescribed by this Charter, or, to the extent that the manner is not prescribed herein, in such manner as the Council may prescribe by ordinance. The powers of the municipality may also be exercised, except as a contrary intent appears in this Charter or in the enactments of the Council conformably hereto, in such manner as may now or hereafter be provided by the general laws of Ohio. Enumeration of, or reference to particular powers by this Charter shall not be construed to be exclusive.

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ARTICLE III

Initiative, Referendum and Recall

Section 1. Initiative, Referendum

Ordinances and other measures may be proposed by initiative petition and adopted by elections, and ordinances and other measures adopted by the Council shall be subject to referendum, to the extent and in the manner now or hereafter provided by this Charter or the Laws of Ohio.

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ARTICLE V

The Council

Section 1. Powers, Number and Terms

All the legislative powers of the City of Eastlake, except as limited by this Charter and the Constitution of Ohio, shall be vested in a Council of seven (7) members of whom three (3) members shall be elected at large and four (4) members of which shall be elected from wards, one from each ward.

Members of Council shall serve for a term of four (4) years, beginning on the first day of January next following their election and unitl their successors are elected and qualified except that the three members at large elected at the Regular Municipal election in 1955 shall serve for two (2) years and thereafter all councilmen at large shall be elected for a four (4) year term.

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ARTICLE VIII

City Planning Commission

Section 3. Mandatory Referral

That any change to the existing land uses or any change whatsoever to any ordinance, or the enactment of any ordinance referring to other regulations controlling the development of land and the selling or leasing or rental of parkways, playgrounds, or other city lands or real property, or for the widening, narrowing, re-locating, vacating, or changing the use of any public street, avenue, boulevard, or alley cannot be approved unless and until it shall have been submitted to the Planning Commission, for approval or disapproval. That in the event the city council should approve any of the preceding changes, or enactments, whether or approved or disapproved by the Planning Commission it shall not be approved or passed by the declaration of an emergency, and it shall not be effective, but it shall be mandatory that the same be approved by a 55% favorable vote of all votes cast of the qualified electors of the City of Eastlake at the next regular municipal election, if one shall occur not less than sixty (60) or more than one hundred and twenty (120) days after its passage, otherwise at a special election falling on the generally established day of the primary election. Said issue shall be submitted to the electors of the City only after approval of a change of an existing land use by the Council for an applicant, and the applicant agrees to assume all costs of the election and post bond with the city Auditor in an amount estimated by the County Auditor or the Board of Elections proportionate with any other issues that may be on the ballot at the same time. The applicant shall further agree to authorize the City Auditor to advertise, and assume the obligations to pay, for a notice of the posted

bond and the requested land use change in a newspaper of general circulations, whose circulation is either the largest, or second to the largest within the limits of the City for two consecutive times, with at least two weeks between notices and a third notice one week prior to the election. Should the land use request not be affirmed by a 55% favorable vote it cannot be presented again for one full year and a new request must be made at that time.

It shall be the duty of any applicant for a land use change to obtain zoning codes, maps, thoroughfare and sewer plans or advice of the city council and officials and approving bodies for interpretation of this section as they are always available. If this section is violated and a building is under construction or completely constructed it shall be mandatory for the Mayor, Safety Director, Service Director and Building Inspector equally to have the building or structure removed completely within 60 days at the owners expense as these officials are charged with the enforcement of this section. It shall be mandatory that the City Council charge and fund the Planning Commission to have on display at all times in the council chambers and available to the public a zone map, showing a legend and summary of zoning regulations by district, Major use, Minimum and maximum lot width and that each district, city park, playground, and city lands be accurately located and identified with the date of adoption and the date of revisions to date. Any and all revisions will be posted to the zone map within 90 days of their occurrence. Maps shall be available to each land owner of the city for a nominal cost not to exceed $2.50 each on demand. Maps shall be available within six months of this charter change.

Approved: November 2, 1971

General Election